Communications Workers of America
AFL-CIO, CLC

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Via Electronic Filing

February 23, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: CWA Response to Frontier/Verizon Objection to Request for Access to Second Protective Order Information, WC Docket No. 09-95

Dear Ms. Dortch:

The Communications Workers of America ("CWA") hereby responds to the objection ("Objection") filed on February 12, 2010, by Frontier Communications Corporation ("Frontier") and Verizon Communications, Inc. ("Verizon"), to the Acknowledgements of Confidentiality filed in this proceeding by CWA concerning its consultant, Randy Barber, and its employees, Debbie Goldman and Kenneth Peres.[1] The Objection argues that neither CWA's outside consultant Barber, nor CWA's employees, Goldman and Peres, are entitled to access the Highly Confidential Documents or Information under the Commission's Second Protective Order in this proceeding.[2]

[1] Letter to Marlene H. Dortch from Michael E. Grover and John T. Nakahata, WC Docket No. 09-95 (filed Feb. 12, 2010) ("Objection").
[2] Second Protective Order, WC Docket No. 09-95, DA 10-221 (rel. Feb. 2, 2010).

The Commission should deny the Objection and permit Barber, Goldman and Peres access to the Highly Confidential Information subject to the terms and conditions of the Second Protective Order and their executed acknowledgements of the same.

At the outset, the Frontier/Verizon Objection rests primarily, if not entirely, on two related, but faulty, propositions: That CWA "is not a 'non-commercial party' under the Second Protective Order due to its participation in collective bargaining on behalf of a unionized workforce," and that even if CWA is a "non-commercial party," collective bargaining falls within the meaning of "competitive decision-making activities of any competitor of [Frontier or Verizon]" in the "Outside Consultant" definition in paragraph 5 of the Second Protective Order. Objection at 1-2 & 4-5.

Frontier/Verizon cite no Commission precedent whatsoever in support of its claims that CWA is a "commercial party" or that CWA is a "competitor" of Frontier or Verizon. Nor is CWA aware of any such Commission precedent. CWA is aware, however, of directly analogous state public utility commission (PUC) precedent in discovery disputes rejecting a utility's claim that a union representing the utility's employees is its "competitor." In fact, at least three PUCs have squarely rejected the argument that Frontier/Verizon make here. *Application of Sprint Nextel for Approval of Transfer of Control*, 2006 Mo. PSC LEXIS 218. ("Obviously, CWA is not a competitor of Sprint Nextel"); *Formal Case No. 154, Application of Washington Gas Light Co.*, Order on Reconsideration, Order No. 14586, at ¶¶ 26 & 59 (D.C. PSC Sept. 28, 2007) (union "argues persuasively . . . that a labor union . . . representing a utility's own employees, should not be viewed as a 'competitor' of the utility for purposes of discovery"); *In re New England Gas Co. Rate Filing*, 2002 R.I. PUC LEXIS 15 (Rhode Island PUC rule "has not been

interpreted to deem a labor union which is in dispute with its own company to be in competition with its own company").

Nor is a union, such as CWA, a "commercial party" in any normal sense of the term. CWA is a non-profit Section 501(c) (5) organization, whose purpose is to protect the organizing and collective bargaining rights of its employee members – rights that are enshrined and protected by longstanding federal law and policy. 29 U.S.C. §§ 151 & 152(a) (5); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Consistent with that federal law and policy, neither CWA nor its Frontier or Verizon employee members can or should be equated with a mere "supplier such as an equipment provider," as the Objection (at 4) rather insultingly attempts to do.

Once the fallacies of Frontier/Verizon's effort to transform CWA into their "commercial" "supplier" or "competitor" are swept away, their Objection collapses.

Consultant Barber. Frontier/Verizon claim that CWA designee Barber, although an outside consultant retained for the purpose of assisting CWA in this proceeding, is nevertheless not entitled to access Highly Confidential Information for two reasons.

First, the Objection argues (at 3) that Barber provides "advice about or [participates] in the business decisions of" CWA or "the analysis underlying those business decisions" and thus allegedly does not meet the criteria of "outside consultant" within the meaning of the Second Protective Order. This is so, according to Frontier/Verizon, because Barber "consults with unions" and "specializes in complex financial and operational analyses of companies and industries, often in the context of collective bargaining or in support of clients' strategic or policy interests." *Id.* But this entire argument assumes that CWA is a "commercial party." As we have

shown above, it is not. The Second Protective Order's standard for disclosure to "outside consultants" of "non-commercial parties" is that the person "is not involved in the competitive decision-making activities of any competitor of a Submitting Party." And as explained above, CWA is not a "competitor" of Frontier or Verizon.

Second, Frontier/Verizon claims (at 3-4) that Barber should be denied access to Highly Confidential Information because an October 14, 2009, order of the Oregon PUC found that he had failed to comply with the requirements of an Oregon PUC confidentiality order. This claim cannot serve as a basis for denying Barber access to the Highly Confidential Information in this proceeding for several reasons.

As an initial matter, it should be noted that the only aspect of the Oregon PUC Order involving Barber related *not* to any improper disclosure of any financial model or other confidential financial business information or data at issue here, but to Barber's identification of documents in a Pennsylvania PUC proceeding summarizing publicly available SEC ownership information that had been obtained in the Oregon PUC proceeding, and only for the purpose of proving that Verizon possessed that ownership information. Oregon PUC Order at 4. Moreover, the Oregon PUC found that Barber failed to comply with its confidentiality order *not* because the information was in fact properly classified as confidential, but because the union there (IBEW) had failed to follow the Oregon PUC confidentiality order's procedure for challenging confidential treatment. *Id.*

More generally, Frontier/Verizon cite no provision in the Second Confidentiality Order or any authority for the proposition that if a consultant like Barber, who has participated in numerous proceedings subject to confidentiality orders across the country and abided by those

orders, is found on a single limited occasion to have violated a confidentiality order of one PUC, he should therefore be automatically disqualified from ever serving as an outside consultant to a party in an FCC proceeding. If the rule is to be "one error disqualifies" (which we think it should not), the Commission should go through the process to adopt it and place such a disqualification requirement in its confidentiality orders.

In any event, by executing and accepting the terms of the Second Protective Order's acknowledgement, Barber will be subject to federal sanction and enforcement should he fail to comply with the terms of that Order. Frontier/Verizon offers no sound reason why the Commission's own enforcement and sanction authority would be an insufficient deterrent in this instance.

Perhaps more telling is what else Frontier/Verizon know about Barber's participation in other state PUC proceedings about the Frontier/Verizon transaction but about which they have chosen not to inform the Commission. Barber has already submitted testimony concerning the Frontier/Verizon transaction and analyzing the financial model that is the subject of the Second Confidentiality Order in *three* state PUC proceedings – Illinois, Ohio and West Virginia – since the Oregon PUC Order was issued, all without any objection by Verizon or Frontier relating to the Oregon PUC Order.[3]

Moreover, as a result of those state PUC proceedings, Barber already has access to most, if not all, of the Highly Confidential Information that is the subject of the Second Protective Order here, and he has already performed an analysis of that information. Pursuant to the

[3] Barber's testimony in the West Virginia PSC proceeding, filed on November 16, 2009, is cited on page 3, at note 9 of Frontier/Verizon's Objection. Attached hereto are the cover pages of Barber's October 20, 2009, pre-filed direct testimony before the Illinois Commerce Commission and his October 14, 2009, pre-filed direct testimony before the Ohio PUC.

protective orders in those proceedings, of course, Barber cannot use the information he obtained, nor can he provide the Commission here with his analysis of that information already performed in connection with the state PUC proceedings, unless he is permitted to independently reacquire that information through his acknowledgement to which Frontier/Verizon now object.

Thus, accepting Frontier/Verizon's objection to Barber will not deprive him of the information or from analyzing it. He has already done that pursuant to, and consistent with, the confidentiality orders of those state PUCs. Rather, the only, and perverse, result of accepting Frontier/Verizon's objection would be to deprive the Commission of information and analysis concerning the transaction that Barber has already performed and submitted to at least three state PUCs in their proceedings concerning the same transaction. Frontier/Verizon do not, and cannot, explain what policy or public interest purpose would be served by depriving the Commission of information and analysis pertinent to an assessment of the transaction before it and of which state PUCs have had the benefit in assessing that transaction, Frontier/Verizon do not, and cannot, explain. The only result would be to enable Frontier/Verizon to shield from the Commission information concerning the effects of the Frontier/Verizon transaction, the benefits of which its colleague state PUCs have enjoyed in their review of that same transaction.

Goldman and Peres. Frontier/Verizon first argue that Goldman and Peres are not entitled to access the Highly Confidential Information because, as CWA employees, they are not Outside Consultants or Outside Counsel within the meaning of the Second Confidentiality Order. (Objection at 4.) This argument, of course, turns entirely on the assumption that CWA is a "commercial party," rather than a "non-commercial party," under the Second Protective Order.

As explained above, that is incorrect. CWA is not a "commercial party" within the meaning of the Second Protective Order, nor is it a "competitor" of Frontier or Verizon.

In an effort to try to demonstrate what they claim is the "commercial party" nature of CWA, Frontier/Verizon point to CWA's collective bargaining with Frontier and Verizon units, and likens CWA's members to pieces of equipment supplied by Frontier's and Verizon's suppliers. (Objection at 4.) But as noted above, this argument overlooks that as a matter of longstanding federal law and policy, workers are not mere widgets, and the rights of workers to organize and collectively bargain with their employers embody unique public interest policies and protections going far beyond the typical commercial relationship between supplier and customer. 29 U.S.C. §§ 151 & 152(a) (5).

Moreover, Frontier/Verizon's argument about what they believe is the potential utility of the Highly Confidential Information to CWA's current and forthcoming collective bargaining with Frontier and/or Verizon proves too much. If, as Frontier/Verizon claim, the financial model and other Highly Confidential Information is in fact relevant to that collective bargaining, then CWA is independently entitled to that information for use in collective bargaining under the National Labor Relations Act and NLRB rules. *See, e.g., NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Leland Stanford Jr. University*, 262 NLRB 136 (1982); *Conrock Co.*, 263 NLRB 1293 (1982). Thus, by Frontier/Verizon's own admission, the very "injury" that they claim they will suffer from Goldman and Peres (and Barber as well, for that matter) gaining access to the Highly Confidential Information – that the information could be helpful to CWA in collective bargaining – is a right that CWA possesses in connection with collective bargaining under federal labor laws. That can hardly be a cognizable

"injury" here, and it serves to underscore our earlier point: as a matter of federal law and policy, CWA cannot be construed to be a "competitor," and collective bargaining cannot be equated to "competitive decision-making activities," within the meaning of the "Outside Consultant" definition in the Second Protective Order. Accordingly, Goldman and Peres are entitled to access to the Highly Confidential Information, subject to the terms of the acknowledgements they have already executed.

Finally, there is an additional strong public policy reason that militates against granting Frontier/Verizon's Objection against Goldman and Peres. If the Second Confidentiality Order were construed to prohibit in-house union employees like Goldman and Peres from obtaining access to Highly Confidential Information, it would impose on non-profit organizations like CWA the burden and expense of either (1) hiring more outside consultants to perform tasks currently performed by employees, or (2) expanding and reorganizing CWA's in-house staff to structurally separate those employees who are involved with collective bargaining from those who work on Commission proceedings such as this one, functions that are currently integrated with CWA's staff. Imposing such additional costs and structural separation burdens on CWA here, and unions in general, would prejudice them relative to FCC regulated employers that regularly participate in Commission proceedings and that typically have more resources and specialized staff for FCC matters. The result would likely be to chill union participation in proceedings such as this one, denying the Commission the benefit of critical input concerning the impact of FCC applications such as this one on the applicants' employees. While employers like Frontier and Verizon would no doubt like that result, the Commission should not, as it would

"deny the Commission the benefit of comment from commenters with limited resources,"[4] and tilt the record on which the FCC makes its decisions improperly toward the interests of FCC regulated employers and against their employees.

* * * * *

For the foregoing reasons, Frontier/Verizon's Objection should be denied, and the Commission should order Frontier/Verizon to provide Barber, Goldman and Peres with access to Highly Confidential Information pursuant to the terms of their executed acknowledgements that have already been delivered to Frontier/Verizon

Respectfully submitted,

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cc: Alexis Johns, Competition Policy Division, FCC
John T. Nakahata, Counsel to Frontier Communications Corporation
Michael E. Glover, Counsel to Verizon

[4] *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, Report and Order 13 FCC Rcd 24816, 24829 (¶ 17) (1998).

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of	)	
	)	
The Application of Frontier	)	
Communications Corporation, New	)	Case No. 09-454-TP-ACO
Communications Holdings, Inc. and	)	
Verizon Communications Inc. for Consent	)	
and Approval of a Change in Control	)	

PRE-FILED DIRECT TESTIMONY OF RANDY BARBER

ON BEHALF OF THE COMMUNICATIONS WORKERS OF AMERICA AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 986

Filed: October 14, 2009

INCLUDES ALLEGED CONFIDENTIAL AND HIGHLY SENSITIVE CONFIDENTIAL INFORMATION

IBEW Exhibit 1.0

BEFORE THE ILLINOIS COMMERCE COMMISSION

Frontier Communications Corporation, Verizon Communications, Inc., Verizon North Inc., Verizon South Inc., New Communications of the Carolinas, Inc. Joint Application for the approval of a Reorganization pursuant to Section 7-204 of the Public Utilities Act the Issuance of Certificates of Exchange Service Authority Pursuant to Sections 13-405 to New Communications of the Carolinas, Inc.; the Discontinuance of Service for Verizon South Inc. pursuant to Section 13-406; the Issuance of an Order Approving Designation of New Communications of the Carolinas, Inc. as an Eligible Telecommunications Carrier Covering the Service Area Consisting of the Exchanges to be Acquired from Verizon South Inc. Upon the Closing of the Proposed Transaction and the Granting of All Other Necessary and Appropriate Relief.	)	Docket No. 09-0268

PRE-FILED DIRECT TESTIMONY OF RANDY BARBER

ON BEHALF OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 21, 51, AND 702

Filed: October 20, 2009

INCLUDES ALLEGED CONFIDENTIAL AND CONFIDENTIAL & PROPRIETARY INFORMATION